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No. 15362

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM ERNEST HOFFMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF OF APPELLEE.

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## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Rules

STATUTES PAGE

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### Jurisdiction.

The jurisdiction of the District Court in this case arose under Title 18, U. S. C., Section 495, June 25, 1948, Chapter 645, 62 Stats. 711, and Title 18, U. S. C. A., Section 3231, June 25, 1948, Chapter 645, 62 Stats. 826.

The jurisdiction of this Court was invoked under the provisions of Title 28, U. S. C. A., Section 1291, June 25, 1948, Chapter 646, 62 Stats. 929, and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., as amended December 27, 1948, effective January 1, 1948.

## Statement of Case.

On May 20, 1955, appellant was indicted on seven counts of forgery of a Government check in violation of Title 18, U. S. C. A., Section 495. Section 495 provides:

> "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> "Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> "Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 711."

Following a trial by jury on his plea of not guilty appellant was found guilty on six counts of the indictment. Count III was dismissed. Sentence was imposed by the Court at five years on Count I; and two and one-half years on Count II to run consecutively with the five

years imposed on Count I; and five years on each of Counts IV, V, and VI to run concurrently with each other and concurrently with the period on Count I, making a total of seven and one-half years' imprisonment. Imposition of sentence on Count VII was suspended for the period of five years and the appellant was placed on probation for this period. Said period of probation was made to commence at the expiration of the periods of imprisonment on Counts I, II, IV, V and VI. At the trial below appellant Hoffman was represented by his retained counsel, Richard E. Erwin, Esq. No appeal was taken from the Judgment of Conviction, but on September 7, 1956, appellant filed in the Court below a motion under 28 U. S. C. A., Section 2255, to correct his sentence received on the above-mentioned Judgment of Conviction. This motion was denied by the Honorable Ben Harrison on September 10, 1956. The instant appeal was taken from said order of denial.

## ARGUMENT.

Although appellant was represented on trial by retained counsel he prosecutes this appeal *in propria persona.* Bearing in mind the admonition of the Supreme Court that judicial liberality be exercised in considering the petitions of such persons, *Tompkins v. Missouri,* 322 U. S. 485, 487; *Darr v. Burford* (1949), 339 U. S. 200, 203; *Thomas v. Tietz* (1953, 9th Cir.), 205 F. 2d 236, it is still submitted that appellant by his brief herein shows no cause for relief and the order appealed from accordingly should be affirmed.

### Proceedings Under 28 U. S. C. A., Section 2255, May Not Be Used to Relitigate Issues Properly Raised by Appeal.

As heretofore stated, appellant Hoffman took no appeal from his Judgment of Conviction. The instant appeal is taken from the denial of his Motion to Correct Sentence under 28 U. S. C. A., Section 2255. Regardless of the caption it is apparent that by this appeal, appellant seeks to have determined issues which are properly cognizable only by an appeal on the merits of the case. Thus referring to his trial below appellant states (Br. 6):

> "On or about the 12th day of September, 1955, after a plea of not guilty the defendant/appellant was placed upon his trial and found guilty by a jury on all counts. *It was during and throughout this said trial that the herein stated, errors, violations and denial of those rights secured to the appellant by the Constitution of the United States were violated.*"

Patently appellant seeks review of the questions going to the merits of his case arising out of the trial of the case itself and depending largely upon determination of factual

matters. Illustrative is appellant's attempt (Br. 7) to digest the evidence adduced at the *trial* of his case and predicate a considerable portion of his argument upon it. Inasmuch as this appeal is from a denial of a motion under Section 2255 (*supra*) such attempt runs afoul of the settled rule that a motion under 28 U. S. C. A., Section 2255, may not be used to secure a review of questions properly raised by appeal on the merits of the case. Controlling in this regard is the succinct opinion of this Court in *Hastings, et al. v. United States* (1950, 9th Cir.), 184 F. 2d 939, hereinafter set out in full, viz.:

> PER CURIAM. "This is an appeal from a judgment in a proceeding under 28 U. S. C. A. 2255, denying appellant's motion to vacate a judgment sentencing them to a confinement for two years for the possession of a sawed-off shotgun, a 'firearm' which had not been registered, in violation of 26 U. S. C. A. 3261: The ground of the motion as urged here is that the verdict of guilty is without evidence to support it and that the trial judge gave an erroneous instruction. *There was no appeal from the judgment of conviction and what appellants seek in this Sec. 2255 proceeding is a retrial of their case.*
>
> "A proceeding under section 2255 is intended as a substitute for habeas corpus. The contentions here urged would not be considered in a habeas corpus proceeding. We agree with the opinion of the Fourth Circuit in Taylor v. United States, 4 Cir., 177 F. 2d 194, which states at page 195, 'Prisoners adjudged guilty of crime should understand that 28 U. S. C. A., Sec. 2255, does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence, if the petitioner desires to raise them. Only where

> the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U. S. C. A., Sec. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.'
>
> "The judgment is affirmed." (Emphasis added.)

Inasmuch as appellant was represented below by retained counsel the language of the Fourth Circuit in the recent case of *Banghart v. United States* (1953), 208 F. 2d 902, is pertinent, to wit:

> "It appears, however, that none of the questions which he now seeks to raise were raised upon the trial or by appeal, although appellant was represented by able counsel of his own choosing and there is no suggestion that counsel did not faithfully represent his interests. A motion under 28 U. S. C. A., Sec. 2255, is proper only where the judgment under which a prisoner is confined is subject to collateral attack. It may not be used in lieu of appeal to review questions which were raised *or should have been raised upon the trial.*" (Emphasis added.)

The Tenth Circuit discussed the nature of the remedy in *Hearst v. United States* (1949, 10th Cir.), 177 F. 2d 894, 895, where speaking of Section 2255 (*supra*), the Court stated:

> "That section does not give a prisoner the right to obtain a review, first by the court which imposed the sentence and then on appeal from a denial of a motion to vacate, of errors of fact or law that must be raised by timely appeal. It does not enlarge the class of attacks which may be made upon a judgment of conviction, but provides that the attack must be made in the court where the sentence was imposed

and not in some other court through resort to habeas corpus, unless it appears that the remedy by motion is inadequate. It is limited to matters that may be raised by collateral attack. It is only where the judgment was rendered without jurisdiction, the sentence imposed was not authorized by law, or there was such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack that a motion to vacate will lie under such section.

"Errors in admission of evidence must be raised by appeal and do not constitute a basis for collateral attack."

See also:

*Hill v. United States* (1955, 6th Cir.), 223 F. 2d 699;

*Davis v. United States* (1954, 7th Cir.), 214 F. 2d 594;

*United States v. Rutkin* (1954, 3rd Cir.), 212 F. 2d 641;

*Roper v. United States* (1954, 4th Cir.), 212 F. 2d 783;

*United States v. Spadafora* (1953, 7th Cir.), 207 F. 2d 291;

*Klein v. United States* (1953, 7th Cir.), 204 F. 2d 513;

*Hilliard v. United States* (1950, 4th Cir.), 185 F. 2d 454;

*Goss v. United States* (1949, 6th Cir.), 179 F. 2d 706;

*Storey v. United States* (1949, 8th Cir.), 174 F. 2d 120.

On the basis of the foregoing authority, it is submitted that appellant's attempt to retry the issues in the case by way of a motion under Section 2255 should be denied.

## Appellant's Allegations Are Not Supported by the Record.

Appellant's chronicle of the evidence at his *trial* (Br. 7) is subject to the further objection that it is not supported by the record docketed with this Honorable Court. The Designation of the Record on Appeal [Clk. Tr. 43] filed in the Court below, nowhere makes provision for the inclusion of any Reporter's Transcript of the proceedings on trial. This, and other, Courts of Appeals have uniformly held that the sufficiency of the evidence in the Court below cannot be questioned in absence of a proper transcript of the proceedings. This requirement is succinctly stated by the Seventh Circuit in *In re Chapman Coal Co.* (1952, 7th Cir.), 196 F. 2d 779, 785:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by the evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error. Turner Glass Corp. v. Hartford Empire Corp., 7 Cir., 173 F. 2d 49, 51; Royal Petroleum Corp. v. Smith, 2 Cir., 127 F. 2d 841, 843; 12 Cyc. of Federal Procedure, 2nd Ed. 1944, Sec. 6208, p. 224 *et seq.*"

As this Court recently said in *Jernigan v. Southern Pacific Co.* (1944, 9th Cir.), 222 F. 2d 245, 248:

> "Nor can we question the sufficiency of the evidence which resulted in the order below. Since the burden of showing grounds on which a judgment should be reversed rests upon the appellant, and the evidence not being here, the appropriateness of the validity of the evidence to support the order and the judgment cannot now be questioned."

See also the extensive compilation of authority contained in Note 6, page 248 of the *Jernigan* opinion. It is abundantly clear that it is the duty of the appellant to furnish this Honorable Court with a sufficient and proper record and to show with particularity wherein claimed error has been committed. This he has failed to do. Nor can he properly do so inasmuch as the issues which he would allegedly raise are improper in a collateral appeal such as is involved under Section 2255 (*supra*).

## Appellant Was Not Prejudiced by the Actions of the Court and Prosecutor.

Correlative perhaps, to the appellant's failure to designate and present to this Honorable Court, a proper record, is his failure to state beyond bare allegations in what way he was prejudiced by actions of Court and counsel. It is provided in Rule 52 of the Federal Rules of Criminal Procedure, 18 U. S. C. A.:

> "(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

It is settled the burden of demonstrating error is upon an appellant.

*Myers v. United States* (1949, 8th Cir.), 174 F. 2d 329;

*Kimball Laundry Co. v. United States* (1948, 8th Cir.), 166 F. 2d 856.

It is established contrary to appellant's contentions that a reviewing court indulges all presumptions in favor of the validity of the trial court's order. Prejudicial error will not be presumed, it must be specifically and affirmatively shown. This appellant has failed to show in what way he was prejudiced by the actions of Court and counsel. Lacking a transcript we have only his bare allegations that certain prejudicial statements were made. Even in this he indulges in conclusions, viz. (Br. 7):

> "When the defendant/appellant was on the stand the prosecution for the Government set forth an attack upon the defendant's past record making him admit his previous conviction for the State of California for the charge of forgery as well as other arrests that the defendant has been arrested for, although he has proven his innocence to the charges. The prosecution brought forth the fact that the defendant/appellants girl friend had been convicted for a charge of Forgery by the State of California and was at the time serving a sentence and the the defendant/appellant had assisted in her defense. The Court itself asked at that time if the defendant/appellant would have assisted her if he would have thought her guilty."

In absence of a transcript it is impossible to find error on the basis of appellant's conclusions. Accordingly, it is submitted that appellant's assertion of prejudice must fall in absence of substantiation.

**Appellant Was Properly Tried, Convicted and Sentenced for a Violation of 18 U. S. C. A., Section 495.**

In reliance of certain archaic authority (*Wilson v. United States,* 16732 Fed. Cases) appellant urges that he was improperly convicted under Section 495, Title 18, U. S. C. A.

The argument is made that checks cannot fall under the "other writings" provision used in this section. This contention has been determined adversely to appellant's view in *Prussian v. United States* (1931), 282 U. S. 675, 679, wherein it was stated:

> "But we think the indictment is to be sustained as charging an offense under section 29 of the Criminal Code, which punishes the forgery of 'any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving . . . from the United States, or any of their officers or agents, any sum of money.' The indictment alleges specifically and with certainty the forgery of the endorsement on the draft, for the purpose of obtaining a sum of money from the Treasurer of the United States, and charges a violation of section 29. We think the endorsement was a 'writing' within that section. Its language is 'comprehensive' and all 'embracing'. *Cf.* United States v. Davis, 231 U. S. 183, 188. The writings enumerated have no common characteristic from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of 'other writing' to the enumeration was therefore not for the purpose of including writings of a limited class, but rather of extending the penal provisions of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the

> United States. . . . It has been generally assumed by the lower federal courts that Section 29 covers the forging of an endorsement. . . ."

See also:

> *Conklin v. Cozarts,* 158 F. 2d 676, cert. den. 322 U. S. 801.

Appellant seeks to make the distinction between "pension type checks" and "allotment type checks" (Br. 8). This problem has been touched by this Honorable Court in *DeMaurez v. Squier* (1944, 9th Cir.), 144 F. 2d 564, wherein Judge Stephens shows the basic problem to be the difference between the penalties provided in 18 U. S. C. A., Section 495 (formerly 18 U. S. C. A., Sec. 73) and 38 U. S. C. A., Section 128. This latter section is a specific section dealing with the forgery of endorsement of pension checks and providing a penalty therefor of lesser amount than that contained in the general provisions of 18 U S. C. A., Section 495. In 38 U. S. C. A., Section 128, it is provided:

> "Whoever shall forge the endorsement of the person to whose order any pension check shall be drawn, or whoever with the knowledge that such endorsement is forged shall utter such check, or whoever, by falsely personating such person, shall receive from any person, firm, corporation, or officer or employee of the United States the whole or any portion of the amount represented by such check, shall upon conviction be punished by a fine of not more than $1,000, or be imprisoned not more than five years, or both. August 17, 1912, c. 301, Sec. 4, 37 Stat. 313."

Appellant in his argument (Br. 8) attacks only Counts I, IV, V and VI. Count I involves a check which is labeled "compensation." Counts IV, V and VI involve

social security checks. However, it is unnecessary to reach the problem of whether compensation checks and social security checks are to be considered pension checks within the purview of 38 U. S. C. A., Section 128, or other writings under the provisions of 18 U. S. C. A., Section 495. As heretofore stated, appellant was sentenced to five years on Count I; two and one-half years on Count II consecutive with Count I; and five years on Counts IV, V and VI concurrent with Count I. Inasmuch as sentences of five years could have been imposed by the Court under Section 128 (*supra*), appellant sentenced to a lesser period may not complain. Controlling is the case of *DeMaurez v. Squier* (1941, 9th Cir.), 121 F. 2d 960, wherein Judge Wilbur stated at page 961:

> "Whether or not the check in question was a pension check or a writing coming within the provisions of the earlier Act 18 U. S. C. A., Section 73, *supra,* cannot properly be considered by this court upon this application for writ of habeas corpus for the reason that in either view the cumulative sentence imposed upon the petitioner is for a term of ten years. Until the petitioner has served that term he cannot seek release by habeas corpus on theory that the cumulative sentence of 15 years was excessive and void as to the first count."

Likewise in the instant case even assuming conviction to be had under the lesser provision of Section 128, sentences of five years on each Count could have been imposed. Regardless of under what section sentence was actually made a cumulative sentence was still within the bounds permitted the Court by the lesser statute. Accordingly, appellant cannot be prejudiced thereby.

## Conclusion.

Although appellant ostensibly seeks to appeal from an order denying his petition under 28 U. S. C. A., Section 2255, it is submitted that in actuality he is wrongfully attempting to secure a review of the merits of his case properly presented only by appeal. Appellant has made allegations unsupported by the record in that he has failed to include a transcript to support certain statements which he claims were made. He has thereby failed in his duty as an appellant to present to the Court of Appeals a record in which alleged errors are clearly designated. In any event the cumulative sentence imposed upon the appellant is less than the amount which could have been imposed under the provisions of the lesser statute governing pension checks. Accordingly, it is submitted that this Honorable Court deny appellant's appeal and affirm the order of Judge Harrison.

Respectfully submitted,

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